

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

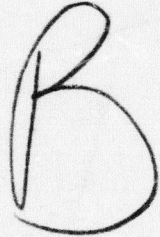
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

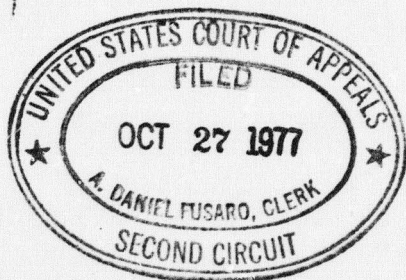
EUGENE SCAFIDI, BARRIO MASCITTI,
ANTHONY DIMATTEO, SAVERIO CARRARA,
MICHAEL DELUCA, JAMES NAPOLI, JR.,
JAMES V. NAPOLI, SR., ROBERT VOULO,
and SABATO VIGORITO,

Defendants-Appellants.


Docket No. 76-1495

PETITION FOR REHEARING
ON BEHALF OF BARRIO MASCITTI
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

EUGENE SCAFIDI, BARRIO MASCITTI,
ANTHONY DIMATTEO, SAVERIO CARRARA,
MICHAEL DELUCA, JAMES NAPOLI, JR.,
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OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Appellant Barrio Mascitti respectfully seeks rehearing, with a suggestion for rehearing en banc, of the opinion and judgment of a panel of this Court (Moore, Smith, and Gurfein, C.JJ.) entered October 13, 1977, affirming his conviction for conducting illegal gambling businesses in violation of 18 U.S.C. §1955. The opinion is annexed hereto as Appendix A.

STATEMENT OF THE CASE

Appellant Mascitti appealed from a judgment of the United States District Court for the Eastern District of New York (Mishler, Ch.J.) convicting him and eight co-defendants of operating a gambling business in violation of state law (18 U.S.C. §1955). The principal proof of guilt against appellant Mascitti on the count of which he was eventually convicted was derived from conversations monitored in a private apartment (Apartment 309)* and in a bar allegedly used by appellants as headquarters of a gambling operation (Hiway Lounge).

*The indictment, as originally presented at trial, charged appellant Mascitti and 19 others with conspiring to conduct a gambling enterprise and three substantive counts. The conspiracy count was eventually dismissed. Appellant Mascitti was not charged in the first substantive count. The second substantive count (Apartment 309) charged him and others with operating a gambling business from December 1972 through March 1973, and was based upon evidence of conversations monitored at Apartment 309, 8-15 27th Avenue, in Queens. The third substantive count -- the "principal count" in this case and the count upon which almost all appellants were convicted -- charged a gambling business operating between March and May 1973, and was based primarily upon conversations monitored at the Hiway Lounge, the alleged headquarters of the gambling enterprise. While the court eventually dismissed the conviction against all the co-defendants on the second substantive count (Apartment 309), the conversations admitted into evidence as to that count played a crucial role in appellant Mascitti's conviction on the third count (Hiway Lounge), as they were used for voice identification, as "other crimes" evidence to prove Mascitti's intent, and as "background" evidence to prove the supposed relationship between the conspirators and the fact that the third count (Hiway Lounge) was but part of a long-standing business (see pp. 6088, 6097, 6106-6108, 6170-6172 of the trial transcript. Accordingly, the Apartment 309 surveillance was, and is, relevant for the petition.

On December 8, 1972, the first electronic surveillance order (309-I) was signed authorizing the interception of oral communications at Apartment 309, 8-15 27th Avenue. A second order (309-II) was signed several weeks later, and on February 20, 1973, a third order (309-III) was signed. As a result of the materials obtained by the Apartment 309 surveillance, the Government sought and received three authorizations (Hiway-I, Hiway-II, Hiway-III) to monitor conversations at the Hiway Lounge.* (Appellants' Joint Appendix at A84-86).

Neither the original 309-I application nor any of the succeeding applications to intercept oral communications at Apartment 309 or the Hiway Lounge contained any statement that the manner of interception was going to be by a device physically required to be placed inside the apartment or lounge. The applications contain no request for authorization to enter the apartment or lounge to plant the devices, nor did any of the surveillance orders contain any authorization to trespass or to break and enter.

Testimony in the suppression hearing showed that the agents placed the monitoring devices in Apartment 309 -- a private apartment leased to one Phyllis Engert, a single woman -- during either the afternoon or evening of December 8, 1972 (H.72-73**),

*Conversations intercepted pursuant to the final order (Hiway-III), issued by Judge Neaher on May 24, 1973, were not introduced into evidence by the Government because of the long delay in sealing the tapes.

**Numerals in parentheses preceded by "H" refer to pages of the transcript of the suppression hearing.

secretly entering the apartment by means of a passkey obtained from the building superintendent (H.326). During the pendency of the orders, the agents again entered surreptitiously to move the bugs (H.333). Although the agents were not certain of the precise number of entries that occurred, at least a third covert entry was undertaken to remove the electronic devices (H.332). The record does not indicate that the issuing judge was aware, prior to the first entry, that covert entry would be attempted, and there is no evidence that any other judge was consulted prior to the other entries into Apartment 309.

Installation of the eavesdropping devices in the Hiway Lounge was accomplished by nighttime covert entry on April 17, 1973, without any specific judicial authorization, by means of a passkey (H.70). At the suppression hearing, the Assistant United States Attorney claimed that, prior to obtaining the Hiway-I order, he had informally alerted Judge Bartels of the Government's intent to enter the building surreptitiously. However, no testimony was taken at that time, and no specific order of authorization was issued (H.498-499). A second covert entry to move one of the microphones occurred during the pendency of the Hiway-I order; this time, no judge was made aware, even informally, of the proposed entry. Following expiration of the Hiway-I order, and before approval of the Hiway-II order, the Government sought and received an order signed on May 2, 1975, by Judge Judd, that permitted entry to rejuvenate the

batteries. Finally, at least one more covert entry occurred during the pendency of Hiway-II or Hiway-III (H.70-71).

In addition to the entries, the Government engaged in other conduct alleged by appellant Mascitti as evidence of insufficient compliance with Title III and the Constitution. Thus, there was a one-week delay in sealing the 309-III order. In addition, there were persistent delays in the filing of court-ordered progress reports, or no filing at all.

On appeal to this Court, appellants argued that the entries not authorized by a separate order were illegal and that suppression was required by the Government's failure to supply progress reports or to seal the tapes in a timely manner. The panel disagreed, filing three separate opinions, one of which was a dissenting opinion by Judge Smith.

In the opinion of this Court, written by Judge Moore, the break-ins were supported since the orders "implied approval for secret entry." Appendix A at 6248. Relying on the lack of a specific "entry" requirement in Title III, and without further case citation, the decision concluded, necessarily, that such "implied" consent was tolerable under the Fourth Amendment, and expressed the opinion that judges were ill-equipped to determine the propriety of trespassory entries. Appendix A at 6249. The Court also found that subsequent entries resulted in "no greater incursion into the appellant's privacy," and therefore approved them. The Court also found no defect in the delay in sealing the 309 tapes or the failure to file progress reports. Finally,

the Court found, inter alia, that there was probable cause to issue the 309-I order.

In dissent, Judge Smith found that the surreptitious entries and other conduct "makes a mockery of the promise that the 'dirty business' of electronic eavesdropping authorized by the Act of 1968 ... would be strictly supervised and controlled." Stating that "it is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries," Judge Smith noted that there are many means of monitoring conversations not so dangerous or intrusive as breaking and entering which should be passed on by a magistrate. Judge Smith concluded:

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in Ford and draw the line here.

Appendix A at 6260.

REASONS FOR GRANTING THE PETITION

Appellant Mascitti requests rehearing, and suggests rehearing en banc, because the decision of the panel that police officers may surreptitiously break and enter private premises to install listening devices without specific antecedent judicial authorization to do so, if not corrected, represents an extraordinary and dangerous assumption of power by police authorities. The importance of this issue was recognized by Judge Gurfein, and compelled his separate decision. It was noted as well by the Government, which characterized this issue as one of "utmost importance to the administration of Title III."*

As noted by the panel, the decision of the majority places this Circuit necessarily in conflict with the District of Columbia Circuit's holding in United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). Moreover, the decision is also squarely in conflict with the recent decision of the Fourth Circuit in In the Matter of the Application of the United States for an Order Authorizing the Interception of Oral Communications, Docket No. 77-1238 (4th Cir., September 20, 1977),** as well as implicitly contrary to the Eighth Circuit's decision in United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976). We submit further that the panel decision is inconsistent as well with prior Supreme

*See Government's motion for extension of time to file its brief on appeal, p.2, ¶17.

**A copy of this opinion is annexed as Appendix B hereto.

Court decisions and with the decisions of this Court which have forcefully and repeatedly emphasized the careful limits and close judicial scrutiny which must be placed upon electronic surveillance. United States v. Marion, 535 F.2d 697, 699 (2d Cir. 1976); United States v. Gigante, 538 F.2d 502, 503 (2d Cir. 1976).

By a separate petition filed on behalf of appellant James V. Napoli, Sr., and other appellants in this case, rehearing has been sought on this issue. We join in the arguments set forth in that petition, and take this opportunity to add our own views. Moreover, we present an additional argument for rehearing: that the panel conclusion that there was probable cause to issue the first 309 order is incorrect, since there are no facts in the record to support that conclusion.

Point I

EXPRESS JUDICIAL AUTHORIZATION IS REQUIRED
BEFORE POLICE AGENTS MAY SURREPTITIOUSLY
ENTER PRIVATE PREMISES TO INSTALL, REPAIR,
MOVE, OR REMOVE LISTENING DEVICES.

The panel holding that once police agents have obtained an order authorizing them to intercept conversations, they are thereby implicitly authorized, without any other judicial review, repeatedly to break and enter private premises is unsupportable as a matter of constitutional law and is contradicted by the record in this case.

1. Necessary to the panel's opinion is the conclusion that trespassory entries need not be specifically authorized

to be constitutional, and that, therefore, secretive physical trespass upon private premises is not a separate or greater intrusion, requiring separate judicial authorization, than the mere interception of conversations. The Supreme Court, however, has indicated that the law is quite the contrary. Well before the advent of notions of conversational privacy, the freedom from physical trespass was separately recognized as a cornerstone of the Fourth Amendment. Thus, Silverman v. United States, 365 U.S. 505 (1961), held that eavesdropping occurring by a trespassory invasion without a warrant was impermissible. In Silverman, the Court decided that it had

... never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial.

Id., 365 U.S. at 512.

The principle that each physical entry be authorized was underlined by Osborn v. United States, 385 U.S. 323 (1966), in which, according to a later case, a warrant was adequate since it "authorized one limited intrusion." Berger v. New York, 388 U.S. 41, 57 (1967).

In no sense was this protection against repeated trespassory entries changed by Berger v. New York, supra, or Katz v. United States, 389 U.S. 347 (1967). In fact, in Berger, the issue was not presented, since each of the two surreptitious entries involved in that case was separately and spe-

cifically authorized. Instead, Berger concerned itself precisely with the overbreadth of a statute permitting without particularity general overhearing of conversations -- the second aspect of the search. Nor was there any intent in Katz, supra, to alter the rule requiring specific authorization for physical invasion of private premises -- rather, the reach of the Fourth Amendment was expanded to require authorization as well in situations including interceptions of conversations by means other than physical trespass. There is nothing in Katz to support the view that a warrant sufficient to permit interception of conversations is ipso facto sufficient, without specific authorization, to support physical trespass. The issues are simply not the same. In sum, in no sense has the Supreme Court adopted the position that surveillance accompanied by physical trespass upon private premises does not entail an invasion of privacy distinct from that which attends the overhearing of private conversations. See Application of the United States, supra; United States v. Ford, supra. The conclusion that the freedom from physical trespass is a separately protected constitutional interest is in accord with basic common sense. As the Fourth Circuit noted:

The distinction is obvious. Non-trespassory eavesdropping penetrates only that expectation of privacy which an individual reasonably possesses with respect to his spoken words. But when agents of the Government physically enter business premises, as to which an individual has a legitimate expectation of privacy, more than just his conversation is subjected to the Government's scrutiny. Intruding officers are capable

of touching items which would not be dis-located by the non-trespassory surveillance.

Appendix B at 17-18 (citations omitted).

2. The panel majority's position is even less defensible when it is remembered that the agents consistently re-entered the premises to move, rejuvenate, or remove the listening devices they had planted. The proposition that the abundance of surreptitious entries disclosed in this case implicated no significant privacy interest of appellant Mascitti is simply unreasonable as a matter of common sense. It is also contrary to the principles established in Osborn v. United States, *supra*, and Berger v. New York, *supra*, 388 U.S. at 57, that each intrusion into private premises be separately authorized.

3. Finally, as Judge Smith noted in his dissenting opinion, the legal questions here did not occur in a vacuum, but rather in the context of a pattern of casual and unsupervised electronic surveillance. No judge was informed prior to the Apartment 309 entry that surreptitious entry was planned, and while the judge knew the conversations to be monitored were to take place inside the apartment, given the existence of parabolic and spike microphones, it was not at all clear that the listening device itself had to be placed inside the apartment or, in any event, that a means like surreptitious entry (rather than the use of informants, for example) was required. The subsequent entry to move or remove the bugs at Apartment 309 were never shown to be necessary. Worse still, in addition

to being unauthorized, the entries may have been unrecorded, since the agent at the suppression hearing was unsure of the number of entries that had occurred. This pattern was repeated with respect to the Hiway Lounge. The Government, in addition to the invasions noted above, unduly delayed the sealing of the tapes and delayed or failed entirely to file court-ordered progress reports. As Judge Smith concluded in his dissent, such conduct indicates "a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised." Appendix A at 6260.

Point II

THE DECISION OF THE PANEL THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT APARTMENT 309 WAS THE SITUS OF GAMBLING IS BASED UPON A MISAPPREHENSION OF THE RECORD.

On appeal, appellant Mascitti argued that the application for the 309-I order failed to allege facts sufficient to conclude that Apartment 309 was the situs of illegal activity. The response of the majority of the panel was brief:

This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Appendix A at 6250.

We respectfully submit that rehearing should be granted because the panel's reading of the record is incorrect. We are unable to find any evidence in the applications, in Judge Mishler's opinion below, or even a claim in the Government's

brief that there was any trash at all discovered at Apartment 309, let alone trash which showed that the apartment was being used for gambling.

The record does show that on one occasion, appellant Mascitti was observed depositing in a trashcan a bag which, when analyzed, was shown to contain gambling records. (Affidavit in support of application for 309-I, ¶¶9, 43, Appellants' Joint Appendix at A247, 261). However, the trashcan was not located at or near 8-15 27th Avenue, the building in which Apartment 309 was located, but near the Elks Head Bar in Brooklyn. Further, the discovery of the bag occurred on September 13, 1972, more than two months before appellant Mascitti or his co-appellant DiMatteo was ever seen in the vicinity of 8-15 27th Avenue, Queens (see Affidavit, ¶38, Appellants' Joint Appendix at A259). Contrary to the implication in the Court's opinion, then, the discovery of the "trash" had nothing to do with showing the use of Apartment 309 for gambling.

Moreover, we submit that the panel's observations concerning the "goings and comings" of appellants Mascitti and DiMatteo from the apartment significantly overstates the surveillance evidence. In fact, appellant Mascitti was seen entering Apartment 309 on but one or two occasions. The remaining times, surveillance evidence consisted of observations of appellant Mascitti in or near 8-15 27th Avenue, the building in which Apartment 309 is located, but which contains at least 100 other apartments (H.399).

In sum, we adhere to our view that the affidavit before the judge failed to show a nexus between the apartment and illegal gambling, and urge that rehearing be granted.

CONCLUSION

For the foregoing reasons, the petition for rehearing or rehearing en banc should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 909, 910, 911, 912,

913, 914, 915, 916, 917—September Term, 1976.

(Argued May 16, 1977

Decided October 13, 1977.)

Docket No. 76-1495

UNITED STATES OF AMERICA,

Appellee,

—against—

EUGENE SCAFIDI, BARIO MASCIUTI, ANTHONY DiMATTEO,
SAVERIO CARRARA, MICHAEL DeLUCA, JAMES NAPOLI, JR.,
JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGO-
RITO,

Appellants.

Before:

MOORE, SMITH and GURFEAN,

Circuit Judges.

Appeal from judgments entered in the United States District Court for the Eastern District of New York before Honorable Jacob Mishler, *Chief Judge*, convicting appellants of conducting illegal gambling businesses in violation of 18 U.S.C. §1955.

All convictions affirmed.

FRED F. BARLOW, Special Attorney, Department
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MICHAEL E. MOORE, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York; William G. Otis, Attorney, Department of Justice, of counsel), *for Appellee.*

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MAX WILD, Esq., New York, New York (Albert J. Brackley, Esq., on the Brief), *for Appellant DeLuca.*

THOMAS J. O'BRIEN, Esq., New York, New York, *for Appellant Napoli, Jr.*

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GUSTAVE H. NEWMAN, New York, New York, *for Appellant Vigorito.*

MOORE, *Circuit Judge*:

Nine defendants, Eugene Scafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Bario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. §1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Scafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March, 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by §1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a \$20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Scafidi).

I.

The evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

The 967 East Second Street Count: Scafidi and Voulo.

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting paraphernalia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Scafidi and others had been using the residence for more than one month. Apparently, Scafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Scafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

The Apartment 309 Count: DiMatteo, Mascitti, Scafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was absent. DiMatteo and Mascitti were shown to be "bank" workers who called Scafidi about gambling at least once each day. A court-ordered wiretap of Scafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under §1955. The count was thus dismissed.

Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Scafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the police are relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.

This was the principal count. Court-ordered bugs revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and DiMatteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hiway-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis,

DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, *i.e.*, three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napolis, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, *i.e.*, three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point during Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily on various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the dis-

crepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellant's claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge should be suppressed because of allegedly improper surreptitious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. §2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. See *Alderman v. United States*, 394 U.S. 165 (1969) (proprietor can object to any unauthorized wiretap; those over-

heard can object only to their voice being overheard); and *Brown v. United States*, 411 U.S. 223 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.

Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. §2510 *et seq.*, prohibits all surreptitious police entries to install,

repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. See *United States v. Ford*, 414 F.Supp. 879, 883 (D. D.C. 1976), *aff'd* 553 F.2d 146 (D.C. Cir. 1977); S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977). See *United States v. Altese*, No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States v. Dalia*, 426 F.Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States v. Finazzo*, 429 F.Supp. 803, 806-8 (E.D.Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part

a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therein at the named premises. The orders further provided that

"this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception. . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976,

"[I]t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to coverily enter the premises and install the necessary equipment." App. at A133.

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over

the bugging operation does not even impliedly impose on them the practical enforcement steps.

We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the original entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

Whether the Government violated various provisions of Title III.

Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Napoli, Sr. presents a similar insufficiency contention regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-

page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. See 18 U.S.C. §2518(1)(c). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 493, 796 (1977); *United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

In *United States v. Fury*, *supra*, 554 F.2d at 532-33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion of the whole surveillance. *United States v. Principie*, 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1113 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United*

States v. Gigante, 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-III. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. §2518(8)(a). *United States v. Fury*, *supra*, 554 F.2d at 533.

Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. See *United States v. Iannelli*, 477 F.2d 999, 1002 (3rd Cir. 1973), *aff'd* 420 U.S. 770 (1975). So, surely, are any sanctions for failure to file timely. See

18 U.S.C. §2518(6). The judges here clearly did not abuse their discretion.

Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States v. Donovan*, 429 U.S. 413 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan*.

DiMatteo argues that the misidentification of him as "Pasquale Rossetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States v. Donovan, supra*. See also *United States v. Variano*, 550 F.2d 1330, 1335-36 (2d Cir. 1977).

Whether there was sufficient evidence to convict Scafidi and Carrara.

Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.

Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked §1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974).

Whether appellants were prejudiced by "spil' over" from their joint trial.

Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good faith. *United States v. Ong*, 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

GURFEIN, *Circuit Judge*, concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), and *compare United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at all? Was there in fact "a neutral pre-determination of the *scope* of [the] search"? *Katz v. United States*, 389 U.S. at 358. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the order? An affirmative answer was "[e]ssential to [the] holding" in *United States v. Ford*, *supra*, 553 F.2d at 170, on constitutional grounds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz*. *See United States v. Tortorello*, 480 F.2d 764, 771-75 (2d Cir. 1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would require a warrant except when the "bug" is carried

by a participant in a face-to-face conversation, *On Lee v. United States*, 343 U.S. 747 (1952), or is used with the consent of a party. See *Katz, supra*. The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. See *United States v. Ramsey*, — U.S. —, 45 U.S.L.W. 4577 (June 6, 1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic surveillance of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively*" (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve such cooperation on his own, he need not get a court order to execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.30 (8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant",— a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: "... no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authoriza-

tion is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. *But cf.* the discussion in *United States v. Ford, supra*. In *Berger* there was a surreptitious entry but the Supreme Court failed to note it as a *separate* constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See Osborn v. United States*, 385 U.S. 323, 330 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse, the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court

speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, see *United States v. Agrusa*, 541 F.2d 690, 696-98 (8th Cir. 1976),¹ as for the protection of the agents.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries suppressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order. . . ." 1968 U.S. Code Cong. & Ad. News 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed

¹ The Eighth Circuit said: "[W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack. 1968 U.S. Code Cong. & Ad. News 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States v. Ford*, 553 F.2d 146, 151 n. 20 (D.C. Cir. 1977); cf. the "spike mike" of *Silverman v. United States*, 365 U.S. 505 (1961). Because of its dangers, "bugging" as distinguished from wire-tapping, is relatively little used. See *United States v. Ford*, *supra*, 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

PUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1238

In the Matter of the Application
of the United States for an
Order Authorizing the Interception
of Oral Communications.

UNITED STATES OF AMERICA,

Appellant,

Appeal from the United States District Court for the
District of Maryland, at Baltimore. Frank A. Kaufman,
District Judge.

No. 77-1284

In re:

UNITED STATES OF AMERICA,

Petitioner.

Upon Petition for a Writ of Mandamus. Frank A. Kaufman,
District Judge.

Submitted July 21, 1977

Decided Sept. 20, 1977

Before WINTER and BUTZNER, Circuit Judges, and FIELD,
Senior Circuit Judge.

(Jervis S. Finney, United States Attorney, and Daniel F. Goldstein, Assistant U. S. Attorney, for the Appellant; Stephen H. Sachs, James A. Rothschild and Robert B. Levin, for Appellee).

FIELD, Senior Circuit Judge:

Frustrated by their own inability to gather sufficient evidence to prosecute several individuals suspected of running a gambling operation in violation of Maryland law, local authorities requested the help of the FBI in late 1976. Until that time, the local probe had proceeded with the help of confidential informants, physical surveillance, a state court-approved wiretap and one instance of other electronic surveillance. It had reached an impasse, however, when the local agents failed in their attempts to intercept what were considered to be crucial conversations occurring within a commercial building where the principal suspects allegedly settled their accounts. The request for federal assistance was made in the hope that the FBI could succeed where the local authorities had failed. Cooperation was justified on the ground that the individuals under investigation were believed to be violating not only Md. Ann. Code art. 27, §§ 240 (illegal bookmaking) and 356 et seq. (illegal lottery), but also 18 U.S.C. §§ 1955 (illegal gambling business) and 371 (conspiracy).

Upon entering the case, the FBI concluded (1) that the interception of oral communications within the commercial building was the only available method of investigation which had a reasonable likelihood of securing the evidence necessary to prove the violations of law, and (2) that the only feasible method of interception would entail surreptitious entry of the building to install, maintain, and retrieve listening devices.¹ It was proposed that three listening devices be placed on the premises, one in a private office and two in a part of the building open to the public. The latter two would be activated only when that part of the building was closed to the public and when it was verified that one or more of the target individuals were present.

On December 20, 1976, the Government applied to the United States District Court for the District of Maryland for an order under 18 U.S.C. § 2518 which would have expressly authorized both the interceptions and one

1. The particular reasons advanced by the Government in support of these conclusions, as well as other specific facts pertinent to the case, are included in the district court record which is presently sealed.

or more surreptitious entries at the commercial premises. An in camera hearing was held on the application the same day.

By memorandum and order dated December 30, 1976,² the district judge denied the order, although he found that the application met the formal and substantive requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. Specifically, the district court agreed that the bugging of the commercial establishment was the only avenue then open to the Government if the investigation was to proceed,³ and that this could only be accomplished by the use of surreptitious entry. Nonetheless, the court concluded

2. In the Matter of the Application of the United States for an Order Authorizing the Interception of Oral Communications, Misc. No. K-1051 (D. Md., Dec. 30, 1976).

3. The court found that confidential informants were unwilling to testify; that some of the principal suspects avoided the telephone which local authorities had tapped; that a search for incriminating records would prove fruitless; that infiltration of the gambling operation would be impossible; and that physical surveillance would be of limited value.

that under the Fourth Amendment standard of "reasonableness," the Government was required to establish some "paramount" or "compelling" interest to justify judicial authorization of the surreptitious entry needed to install the bug, and that such a showing had not been made in this case.

Seeking reversal of the district court's decision, the Government petitioned this court to exercise its appellate jurisdiction under 18 U.S.C. § 3731 or 28 U.S.C. § 1291 (Case No. 77-1238) or, in the alternative, to direct a writ of mandamus to the district judge (Case No. 77-1284). Today we explain more fully our memorandum and order of July 26, 1977, in which, on an expedited basis, we denied the petition for a writ of mandamus in No. 77-1284, accepted appellate jurisdiction under 28 U.S.C. § 1291 in No. 77-1238, reversed the order of the district court, and remanded the case for further proceedings.

The circumstances and conditions under which law enforcement authorities may legally intercept the contents of private wire and oral communications are spelled out in detail by section 802, Title III, of the

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520. While the Act acknowledges the practical distinction between "wiretapping" and "bugging," see 18 U.S.C. §§ 2510 (1), (2), (4), it establishes the same scheme for the judicial authorization of either type of surveillance. Thus, our summary of that scheme with respect to wiretapping in United States v. Bobo, 477 F.2d 974, 980-982 (1973), cert.denied 421 U.S. 909 (1975), pertains similarly to the procedure which the Government and the district court were required to follow in this case.

- I -

Before proceeding to the substance of the Government's claims, we consider briefly the appellee's contention that we are without jurisdiction to review the lower court's denial of the application to intercept the target conversations.

First of all, we note that the Government does not advance 18 U.S.C. § 2518 (1)(b) as a basis for appeal. That section gives the Government the right to appeal

from an order granting a motion to suppress made under 18 U.S.C. § 2518 (10)(a), or the denial of an application for an order of approval for emergency electronic surveillance made pursuant to 18 U.S.C. § 2518 (7).⁴

The Government points out, however, that section 2518 (10)(b) is not exclusive and by its terms the appeals authorized in the two specified circumstances are "[i]n addition to any other right to appeal * * *." Accordingly, the Government contends that it has a right to appeal the district court's order under either 18 U.S.C. § 3731 or 28 U.S.C. § 1291.

We agree with counsel for the appellee that appellate jurisdiction of this case cannot be based upon 18 U.S.C. § 3731. That statute provides in pertinent part:

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding * * *."
(Emphasis supplied).

4. See Application of United States, 427 F.2d 639, 641 (9 Cir. 1970).

In our opinion this case cannot be characterized as a criminal proceeding within the context of the statute since it has arisen prior to any indictment or even a grand jury proceeding. It involves only an investigatory proceeding through which, at best, the Government entertains the mere expectancy of obtaining evidence of crime. The Government has cited no authority directly supporting its position, and its tangential reliance upon Serfass v. United States, 420 U.S. 377 (1975) and United States v. Wilson, 420 U.S. 332 (1975), is wide of the mark. On this jurisdictional point we are inclined to agree with Professor Moore that "[i]n view of the familiar principle of strict construction of the Government's right of appeal in criminal cases, it would appear that an order refusing to authorize interception is not appealable." 9 Moore's Federal Practice, ¶110.10[7] at 232 (2d Ed. 1975).

We are of the opinion, however, that we have jurisdiction of the present case under 28 U.S.C. § 1291 since the district court's order was a "final decision" within the meaning of the statute. As we have pointed

out, the Government's application was not filed in a pending trial or criminal proceeding, but rather in an independent plenary proceeding pursuant to the statutory provisions of Title III, and the order of the district court denying the application was dispositive thereof and had the requisite finality to make it appealable under section 1291. See United States v. Wallace Co., 336 U.S. 793, 802 (1949), and United States v. Calandra, 455 F.2d 750, 752 (6 Cir. 1972).

At this juncture, decisions of the appealability of orders dealing with electronic surveillance under Title III are understandably sparse. The Ninth Circuit had occasion to consider the question in Application of the United States, 427 F.2d 639 (1970), and although the order in that case was somewhat ambiguous, the court of appeals concluded that since the trial court's denial of the Government's request "was truly dispositive of the Government's entire application," it was a final decision which was reviewable under section 1291. We agree with the decision in that case and accept it as supportive of our conclusion.

Counsel for the appellee suggest that the district court order is not final and appealable, contending that 15 U.S.C. § 2518 (1)(e) permits the Government to make successive applications to other judges of the district court in Maryland. Section 2518 (1)(e) provides in part as follows:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * * *

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; * * *."

The legislative history of Title III does not amplify the meaning of this statutory section, but in United States v. Bellosi, 501 F.2d 833, 836 (D.C. Cir. 1974), the court concluded that the legislative intent was "strictly to

limit the employment of those techniques of acquiring information * * * to conform with the commands of the Fourth Amendment * * *." In that case the court discerned a number of objectives that could be served by section 2518 (1)(e), among them being the prevention of judge-shopping; providing the judge to which application is made with detailed information appropriate to judicial consideration of whether the proposed intrusion on privacy is justified; and to reveal to the judge whether past applications have been denied in order to forestall Government harassment or other abuses of the statutory procedure. We accepted Bellosi's analysis of the statutory objectives in United States v. Bernstein, 509 F.2d 996 (4 Cir. 1975), vacated and remanded on other grounds, ___ U. S. ___, 97 S.Ct. 1167 (1977), and in our opinion Congress never intended that section 2518 (1)(e) should be construed to require successive applications as a precondition to an appeal.

- II -

We turn now to the appellant's contention that the district court erred in holding that the Fourth Amendment required the Government to show a "paramount interest" as a condition to judicial approval of a surreptitious entry to install a listening device.

As an initial matter, we cannot accept the suggestion that we may ^Uelide the Fourth Amendment issue on the ground that the Government had no statutory power, with or without judicial permission, to secretly go on to private property for the purpose of planting bugs. Nor, on the other hand, can the question be avoided under the theory that once the district court found the interception of the conversations to be allowable under Title III, the decision to secretly enter the premises became a subsidiary tactical matter committed solely to the judgment of the executing officers.

Admittedly, Title III is devoid of explicit language either authorizing or prohibiting surreptitious entries of private premises for the purpose of installing

or implementing approved electronic surveillance. The statutory section which delineates both the contents of the application and the contours of judicial action upon it, 28 U.S.C. § 2518 (1968), as amended 1970, is silent as to whether the Government is required to inform the authorizing court that such entries are planned and whether the court has the power to condone them. The appellant argues that a surreptitious entry is contemplated by that language in the statute which authorizes the court to order a landlord, custodian, or other person to furnish eavesdroppers with "information, facilities, and technical assistance to accomplish the interception unobtrusively * * *," 18 U.S.C. § 2518 (4) (Emphasis supplied). The contention that this language, at least inferentially, supports the Government's position that Congress intended to approve covert entry as a permissible concomitant of judicially-sanctioned eavesdropping was recognized in United States v. Ford, 414 F.Supp. 879, 883 (D. D.C. 1976), aff'd 553 F.2d 146 (D.C. Cir. 1977). See also United States v. Altese, ____ F.Supp. ____, No. 75-CR-341, 50 (E.D. N.Y., filed October 14, 1976).

We find it unnecessary to rely solely on such tenuous inferences from the statutory language to conclude that covert entry by federal officials is congressionally authorized for, in our opinion, any other conclusion would run counter to the principle that we should attempt to effectuate the purpose of federal legislation and avoid interpretations which produce absurd or nugatory results. Cf. Nardone v. United States, 308 U.S. 338, 341 (1939); Crosse & Blackwell Co. v. FTC, 262 F.2d 600, 605, 606 (4 Cir. 1959). The purpose of Congress in enacting Title III was twofold: first, to safeguard the privacy of wire and oral communications by prohibiting their unauthorized interception, and, second, to combat certain enumerated crimes by allowing law enforcement personnel to conduct constitutionally inoffensive, yet effective, electronic surveillance. That the second of these goals was of paramount concern is indicated by the congressional finding that

"Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice. 82 Stat. 211, Section 801(c) 1968.

Moreover, the documented history of Title III is replete with references to the evils of organized crime and the pressing need to apprehend its perpetrators through the interception of their communications. S. REP. No. 1097, supra, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, et seq. Indeed, at one point the Senate Committee on the Judiciary stated that "[t]he major purpose of Title III is to combat organized crime." Id. at 70; 2157.

We cannot accept the suggestion that Congress, so clearly desirous of arming federal investigators with the power to eavesdrop, intended, without saying so, to forbid the surreptitious placement of devices which might be vital to the effective exercise of that power. Were this true, criminals might avoid apprehension by conducting their conversations upon premises, such as those in the case at hand, which are insusceptible of eavesdropping by non-trespassory means. We discern no congressional intent to open such a loophole in Title III, especially in light of Congress' awareness of prior opinions of the Supreme Court which suggested not only the usefulness of surreptitious trespasses in this type

of investigation, but also the Constitutional permissibility of the secret, trespassory placement of listening devices under proper circumstances.⁵

In our opinion, the fact that Title III does not expressly limit the manner of installing listening devices is, in light of the announced legislative intent, consistent with the conclusion that Congress implicitly commended the question of surreptitious entry to the informed discretion of the district judge, subject to the commands of the Constitution. Thus, where the Government makes the showing required by section 2518, entitling it to an order authorizing the interception of oral communications, surreptitious entry for the purpose of implementing the interception is a statutorily viable

5. See S. REP., *supra*, 66-75, 1968 U.S. Code Cong. & Admin. News 2153-2163, surveying all pre-Title III Supreme Court eavesdropping decisions, with special emphasis upon *Berger v. New York*, 388 U.S. 41 (1967). While the decision in *Berger* went off on other points, the opinion clearly reveals that the interception under scrutiny was accomplished by means of a bugging device surreptitiously planted in the target office. 388 U.S. 45, 81, 96, 102, 110, 111. The Court, however, did not order the suppression of the collected evidence on that basis.

technique. See United States v. Agrusa, 541 F.2d 690 (8 Cir. 1976), cert. denied, 429 U.S. 1045 (1977); United States v. Volpe, 430 F.Supp. 931 (D. Conn. 1977); United States v. Dalia, 426 F.Supp. 862 (D. N.J.1977); United States v. Altese, supra; United States v. London, 424 F.Supp. 556 (D. Md. 1976), aff'd. on other grounds, 556 F.2d 709, sub nom United States v. Clerkley (4 Cir. 1977).

We do not mean to imply, however, that merely because Congress contemplated the use of surreptitious entries, a Title III order authorizing the interception of conversations gives eavesdroppers carte blanche to take any steps whatsoever to effect their plan. Secretive physical trespass upon private premises for the purpose of planting a bug entails an invasion of privacy of constitutional significance distinct from, though collateral to, that which attends the act of overhearing private conversations.⁶ While we have held that judicially-

6. The distinction is obvious. Non-trespassory eavesdropping penetrates only that expectation of privacy which an individual reasonably possesses with respect to his spoken words. Cf. Katz v. United States, 389 U.S. 347 (1967). But when agents of the Government
(Continued on page 18).

granted permission to invade an individual's expectation of conversational privacy, pursuant to Title III's guidelines, is constitutional, United States v. Bobo, 477 F.2d 974 (4 Cir. 1973), cert. denied 421 U.S. 909 (1975), such permission does not suspend the operation of the Fourth Amendment for other purposes. It cannot, in itself, excuse even less grievous governmental incursions into other aspects of private life. As the Supreme Court observed in Chimel v. California, 395 U.S. 752, 767, fn. 12 (1969):

" * * * we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."

Permission to surreptitiously enter private premises cannot, therefore, be implied from a valid

(Footnote 6 continued from page 17)

physically enter business premises, as to which an individual has a legitimate expectation of privacy, G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-354 (1977), more than just his conversation is subjected to the Government's scrutiny. Intruding officers are capable of seeing and touching items which would not be disclosed by the non-trespassory surveillance.

Title III order sanctioning only the interception of oral communications. See United States v. Ford, supra; United States v. Agrusa, supra at 696.⁷ With respect to the instant case, this means that even had the district court issued an order of authorization on the basis of its preliminary conclusion that the statute permitted interception of the target conversations, the door would not have been automatically opened for the Government to plant listening devices in the manner proposed.

The district court was thus correct insofar as it subjected the request for authorization of surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry

7. But see United States v. Dalia, supra; United States v. Altese, supra, and United States v. London, supra, taking the position that authorization of covert entry to install bugging equipment is implicit in an order sanctioning only interception.

by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the district judge to whom the interception application is made is apprized of the planned entry; (2) the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment. Such a requirement is not novel to the law of search and seizure. It also comports with the interception scheme of Title III, since it is apparent that the legislature anticipated meticulous judicial supervision of all aspects of electronic eavesdropping.

- III -

While the district judge correctly bifurcated his consideration of the applications for permission to eavesdrop and to enter, we are of the opinion that he erroneously denied the requested order on the basis that the Fourth Amendment required the Government to show, in addition to "the obviously important interest" it had already established, a "paramount" or "compelling" justification for the secret entry. The difficulty this standard presents is not only that it is foreign to settled Fourth Amendment doctrine, but also that it, in effect, operates to usurp the legislative function. As we have had occasion to observe in another eavesdropping context,

"Men may differ, and many courts have differed, as to what is a reasonable search and seizure, but it is beyond question that the Fourth Amendment only prohibits unreasonable searches and seizures." United States v. Bobo, 477 F.2d 974, 978 (1973) (Emphasis supplied).

While the precise contours of the test of reasonableness vary from case to case, it is clear that the test is designed

"* * * to guarantee that a decision to search private property is justified by a reasonable governmental interest. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

Significantly, the test "is not inflexible or obtusely unyielding to the legitimate needs of law enforcement * * *;" and there is room in the Fourth Amendment to accomodate both the legitimate goals of law enforcement and the individual's right of privacy in the area of electronic surveillance. United States v. Bobo, supra, 477 F.2d at 979.

The test advanced by the lower court would permit the judiciary to substitute its judgment for that of the legislature as to the nature and significance of the public interest which justifies electronic surveillance. In Title III Congress specified the criminal laws which federal authorities are authorized to investigate by the interception of communications. 18 U.S.C. § 2516 (1), as amended 1971. The statute contains no indication that the enforcement of any one of

these specified laws is more or less in the public interest than the similar enforcement of the others. Yet, the "paramount interest" standard adopted by the district court would ignore the statutory equation of the importance of eavesdropping to the enforcement of the enumerated laws. Under such a rationale, an investigation of a violation of the gambling laws, although authorized by section 2516, would apparently never satisfy the paramountcy requirement if conducted by means of eavesdropping devices secretly planted -- even when the apprehension of an offender, as here, could not be accomplished by other means. On the other hand, the use of secretly planted devices to prevent the imminent bombing of an office building, likewise authorized by section 2516, would evidently square with this application of the Fourth Amendment to the statutory procedure.

We cannot approve a standard which differentiates between the interests which Congress has placed on an equal basis, for the courts are not free to pick and choose in this fashion between congressional responses to national problems. Cf. Nebbia v. New York, 291 U.S.

502 (1934). The decision in Burger, supra, and the findings embodied in section 801 of Title III demonstrate that Congress had the power to authorize surveillance to combat the specified crimes and that it exercised that power reasonably. This being established, we would usurp the legislative function if we were to question, as the paramountcy standard apparently does, the wisdom or appropriateness of the congressional decision to place equal emphasis upon the electronic investigation of all the section 2516 crimes.

We decline, therefore, to deviate from the settled Fourth Amendment test of reasonableness. Applying that test, we conclude that the district court should have granted the Government's request for an order sanctioning both the interception of the oral communications and the surreptitious entry into the commercial building for the purpose of installing, maintaining, and removing the bugs. The reasonableness of the proposed interception is implicit in the observation of the court below that "[i]f the Government had * * * sought only authorization to install a telephone wiretap, this Court would

have granted the same." Title III makes no distinction between the requisites of valid wiretapping and bugging applications, and, when authorized pursuant to Title III, neither type of surveillance violates the Fourth Amendment. United States v. Bobo, supra.

With respect to the proposed entry, we are convinced that the manner in which the Government proposes to plant the devices reasonably accommodates both the public interest in criminal investigation and the interests of those individuals who might entertain justifiable expectations that their premises will not be physically invaded by outsiders. The public interest is demonstrated by the finding of the district court that the investigation could proceed only by the surreptitious installation of the device. The willingness of the Government to abide by detailed guidelines as to the time and manner of entry, its assurance that entry will be made only at a time when the premises are unoccupied, and its acknowledgment that the scope of any such entry should not exceed its limited purpose, impresses us as evincing a proper respect for those



aspects of privacy which are unrelated to the precise purpose of the statutory mission.

- IV -

We confirm our order of July 26, 1977, in the following respects:

The petition for a writ of mandamus (No. 77-1284) is denied. The order of the district court in No. 77-1238 is reversed and the case is remanded to the district court for further proceedings. On remand, the district court shall, upon a showing by the government that the factual basis for its request for its order to install three devices for the interception of oral communications at the locality and upon the terms and conditions set forth in its application, including the right to make surreptitious entry to install, maintain and remove the same, is now substantially the same as that demonstrated at the time of the application, issue the requested order.

REVERSED and REMANDED.